DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

CACR05-1284

June 28, 2006

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION [CR 02-4246, CR 04-4879]

HONORABLE TIMOTHY D. FOX, CIRCUIT JUDGE

AFFIRMED AS MODIFIED IN PART; AFFIRMED IN PART; MOTION TO WITHDRAW GRANTED

CALVIN JAROME DAVIS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

This appeal involves two separate cases from Pulaski County Circuit Court - CR 04-4879 and CR 02-4246. In August 2003, Davis was placed on three years' probation in CR 02-4246 for theft by receiving; the State filed a petition to revoke his probation in January 2004, to which he entered a negotiated plea of guilty, but his probation was not revoked at that time. In October 2004, the State filed another petition to revoke Davis's probation, alleging that Davis had failed to report and to pay supervision fees; that petition was amended in July 2005 to add that Davis had committed the offenses of criminal attempt to commit residential burglary, kidnapping, and fleeing, which were the subject of CR 04-4879. In CR 04-4879, Calvin Davis was convicted by a jury of the offenses of kidnapping, criminal attempt to commit residential burglary, and fleeing. Davis was sentenced to consecutive terms of fifteen years in the Arkansas Department of Correction for the offenses of kidnapping and criminal intent to commit residential burglary; the fleeing conviction, a misdemeanor, was merged for purposes of sentencing.

The trial court sat as trier of fact for the revocation petition, and after the jury returned guilty verdicts in CR 04-4879, it revoked Davis's probation in CR 02-4246 and sentenced Davis to ten years in the Arkansas Department of Correction, to be served concurrently with the consecutive fifteen-year sentences he received in CR 04-4879.

On appeal, Davis's counsel has filed a merit appeal in CR 04-4879, arguing that the trial judge erred in denying Davis's motions for directed verdict regarding the convictions for kidnapping and criminal intent to commit residential burglary because there was insufficient evidence to support either conviction. Specifically, with regard to the kidnapping conviction, Davis argues that the State failed to present substantial evidence that he restrained the victim with the necessary intent to commit kidnapping. Davis also argues that the State failed to present substantial evidence to support the criminal attempt to commit residential burglary because there was no evidence that he attempted to enter the victim's apartment with the purpose of committing third-degree assault.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Arkansas Rules of the Supreme Court and Court of Appeals, Davis's counsel has also filed a no-merit appeal and a motion to withdraw as counsel in CR 02-4246, arguing that no reversible errors occurred during the probation revocation hearing and that the appeal is without merit. Counsel's motion is accompanied by a brief referring to everything in the record that might arguably support an appeal, including a list of all rulings adverse to Davis made by the trial court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for

reversal. The clerk of this court furnished Davis with a copy of his counsel's brief and notified him of his right to file *pro se* points; Davis has filed *pro se* points with regard to the no-merit brief filed by his counsel, to which the State has responded. We modify Davis's kidnapping conviction to a conviction for the lesser-included offense of false imprisonment in the second degree in CR 04-4879; affirm his conviction for attempt to commit residential burglary in CR 04-4879; affirm the revocation of his probation in CR 02-4246; and grant counsel's motion to withdraw in CR 02-4246.

In *McElyea v. State*, 87 Ark. App. 103, 105-06, 189 S.W.3d 67, 69 (2004) (citations omitted), this court recited the well-known standard of review for determining the sufficiency of the evidence:

> Directed-verdict motions are treated as challenges to the sufficiency of the evidence. The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial; substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. Evidence is viewed in the light most favorable to the State; only evidence that supports a verdict is considered. When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it.

CR 04-4879 Motion for Directed Verdict - Kidnapping

Arkansas Code Annotated section 5-11-102 (Repl. 2006) provides, in pertinent part:

> A person commits the offense of kidnapping if, without consent, the person restrains another person so as to interfere substantially with the other person's liberty with the purpose of:
>
> . . .
>
> (3) Facilitating the commission of any felony or flight after the felony;
>
> (4) Inflicting physical injury upon the other person;

(5) Engaging in sexual intercourse, deviate sexual activity, or sexual contact with the other person;

(6) Terrorizing the other person or another person; ....

Davis contends that the trial court erred in not granting his motion for directed verdict on the charge of kidnapping because the State failed to prove that he restrained the victim with the purpose of facilitating the commission of any felony; inflicting physical injury upon the victim; engaging in sexual acts with the victim; or terrorizing the victim. We agree.

At trial, Ashley Jones testified that on October 28, 2004, she had been to Grumpy's Bar with friends. She said that she, Kevin Lunsford, and Ashley Gray left the bar and walked to Lunsford's apartment, which was across the street. Jones said that she had been drinking mixed drinks that night; that she had a "buzz"; that she would not have wanted to drive a car at that time; but that she was not so under the influence that she could not see and hear what was happening. Jones stated that she, Lunsford, Gray, and Jessica Persifca were just "hanging out" in Lunsford's apartment. Jones testified that she went outside Lunsford's door to smoke a cigarette and sat on some steps; that she was by herself; and that a male stranger approached her. Jones said that she did not really remember talking to the man, but she was sure that she said something to him. Jones stated that she was uncomfortable because she was the only person out there, and she stood up to put out her cigarette and to go back into the apartment, and the man just picked her up and began "half-running" with her like she "didn't weigh anything." She said that he picked her up by the waist like she was "light as a feather" and began to move really fast. Jones denied knowing the man, or having ever seen him before that night.

Jones testified that when the man first picked her up, she did not really understand what was going on and she asked him what he was doing. She said that she then realized what was happening and began hitting him in the chest and saying, "Put me down. Put me down. What are you doing?" Jones said that it all happened so fast that she did not realize what was happening until it was already over. Jones testified that what made the man put her down was that Lunsford came out of his apartment, saw what was happening, and yelled to the man to stop, at which time he dropped her and took off running. Lunsford and Gray ran after the man, and Jones returned to Lunsford's apartment. Jones said that she did not want to go with him and did not agree to go with him. When Jones was asked if she was afraid, she said that she did not even realize what was happening, but she was scared after she went back into the apartment, where she started crying because she realized what might have happened had Lunsford not come outside.

On cross-examination, Jones denied that she ran into anyone on the walk from Grumpy's to Lunsford's apartment. She reiterated that she had never seen the man who grabbed her, and she testified that it was not possible that she might have walked with him from Grumpy's to Lunsford's apartment. She also reiterated that she absolutely did not consent to go with the man, and that if she had wanted to go, she would have walked instead of him picking her up and carrying her.

Kevin Lunsford testified that as he, Jones, and Gray were walking back to his apartment from Grumpy's, a man approached them and tried to get them to buy some cocaine. Lunsford said that he told the man to go away, and that the three of them continued to his apartment to "hang out." Lunsford stated that Jones went outside to

smoke a cigarette, and that she did not close the door all the way because he was also going to go out to smoke after he found his cigarettes. Lunsford said that he had found his cigarettes and was going outside when he heard Jones scream. When he got outside, he saw that a guy had picked Jones up and that Jones was hitting him and kicking and screaming. Lunsford testified that the man had Jones's mouth covered with his hand and was taking off around the corner of the building. Lunsford stated that he chased the man and said, "What's going on here?" and the man told him to treat his girls better, dropped Jones, and took off running. Lunsford stated that he saw the man then looking into the windows of his apartment. Lunsford identified the man as the person who had approached him earlier about buying cocaine, and at the police station, Lunsford identified Davis from a photo lineup as the person who took Jones. Lunsford identified Davis again at trial.

On cross-examination, Lunsford described Davis as "high," with "crazy-looking eyes," but he said that Davis did not say anything threatening. Lunsford admitted that he did not see Davis pick Jones up; he just heard Jones scream and then he ran outside. Lunsford said that Davis did not threaten him with any words or actions, and he did not threaten Davis; he said that he just wanted to be rid of Davis because Davis was annoying him.

Several Little Rock police officers testified that when they apprehended Davis, he appeared to be under the influence of some drug, that he told them that he was on speed, and that he also told them that he was trying to keep a white girl from getting raped. One officer also said that Davis was sweating profusely. The officer who talked to Davis at

the police station testified that Davis declined to be interviewed formally, but that Davis told him that he suffered from hallucinations and panic attacks, and that he had saved a naked white female from being raped by several white males. Davis was searched when he was taken into custody, but no drugs, alcohol, or weapons were found on his person.

Davis argues that the State failed to present evidence that he had the purpose of facilitating the commission of any felony or flight after the felony; inflicting physical injury upon Jones; engaging in sexual intercourse, deviate sexual activity, or sexual contact with Jones; or terrorizing Jones or another person. A person acts purposely with respect to his conduct or a result thereof "when it is his conscious object to engage in conduct of that nature or to cause such a result." Ark. Code Ann. § 5-2-202(1) (Repl. 2006). In *Watson v. State*, 358 Ark. 212, 219-20, 188 S.W.3d 921, 925 (2004) (citations omitted), our supreme court held:

> A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. Because intent cannot be proven by direct evidence, the jurors are allowed to draw upon their common knowledge and experience to infer it from the circumstances. Moreover, because of the obvious difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts.

Davis admits that in a kidnapping case, the fact finder may infer from circumstantial evidence the purpose for which the defendant restrained the victim. However, he argues that he made no statements to Jones; that he did not have a weapon; and that he did not possess any tools or implements that indicated that he intended to harm Jones or to engage in any sexual activity with her. Therefore, he argues, the State failed to present evidence that he had the purpose to commit kidnapping. We agree.

Even viewing the evidence in the light most favorable to the State, there was nothing in the testimony presented at trial that indicated that Davis restrained Jones with the purpose of facilitating the commission of any felony or flight after the felony; inflicting physical injury upon Jones; engaging in sexual intercourse, deviate sexual activity, or sexual contact with Jones; or terrorizing Jones or another person. Davis said nothing to Jones; he did not attempt to sexually assault her; he did not attempt to physically harm her; no weapons were found in Davis's possession; and Jones testified that she did not know what was happening until Davis had put her down. On these facts, any determination that Davis had the purpose to kidnap Jones would be pure and utter speculation.

However, the jury was also instructed on the lesser-included offenses of first-degree false imprisonment and second-degree false imprisonment. While we hold that the evidence presented at trial does not support a conviction for kidnapping, we hold that the evidence presented does support a conviction for false imprisonment in the second degree, a Class A misdemeanor.

A person commits second-degree false imprisonment "if, without consent and without lawful authority, the person knowingly restrains another person so as to interfere substantially with the other person's liberty." Ark. Code Ann. § 5-11-104(a) (Repl. 2006). In the present case, Davis up picked Ashley Jones off the ground and began to walk with her very quickly, according to Jones's testimony. Additionally, Jones testified that she did not consent to go with Davis. We hold that this evidence supports a conviction for the lesser-included offense of false imprisonment in the second degree, and we modify Davis's kidnapping conviction to second-degree false imprisonment.

Motion for Directed Verdict - Criminal Attempt to Commit Residential Burglary

Davis also argues that the trial court erred in not granting his motion for directed verdict on the charge of criminal attempt to commit residential burglary. A person commits the offense of residential burglary if he enters or remains unlawfully in a residentially occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1997). A person attempts to commit an offense if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be. Ark. Code Ann. § 5-3-201(a)(2) (Repl. 1997). In the present case, the State alleged in its Second Amended Information that Davis attempted to commit residential burglary "by attempting to enter or remain unlawfully in the residential occupiable structure of Martina Kindig, ... , with the purpose of committing therein, ASSAULT THIRD DEGREE. ..."

At trial, Martina Kindig testified that on October 28, 2004, she was taking a bath at approximately 5 a.m. when she heard a noise outside her apartment. When she went to investigate the noise, she noticed that the screen was off one of her windows; however, she did not see anything, and she returned to the bathtub. She then heard a knock on her door, got out of the tub again, and wrapped herself in a towel; when she looked through the peephole, a person she identified as Davis was outside her door. Davis kept knocking, and Kindig kept asking him what he wanted and telling him to go away. Davis

told her that he was "apartment management" and that he needed to see her apartment. When she told him again to go away and that she was going to call the cops, Davis told her that she was just afraid because he was a black man, and he screamed, "Call the f**king cops." Kindig said that Davis then hit or kicked her door three or four times, and that the blows were so hard that the door had to be replaced. The muddy shoe prints and the condition of Kindig's door were captured in pictures taken by the police after they arrived. Kindig testified that after Davis kicked the door, she ran out on her balcony and screamed for help, went into a bedroom and barricaded herself inside with a dresser, and called 911. Kindig said that Davis stopped kicking her door after she screamed, and he ran off. Kindig said that she was afraid that she was going to be hurt in some way.

As the State points out, Davis admits in his argument that his conduct in trying to enter Kindig's apartment constituted substantial evidence that he committed third-degree assault against her, an offense which requires that a person "purposefully create apprehension of imminent physical injury in another person." Ark. Code Ann. § 5-13-207(a) (Repl. 2006). However, he argues that just because his actions outside the apartment constituted third-degree assault, that does not mean that he had the purpose to harm Kindig once he gained entry into the apartment. We disagree. Although Davis did not gain entry to Kindig's apartment, he took a substantial step toward getting inside, and he left only after Kindig screamed and called 911. Kindig also testified that she was afraid that she was going to be harmed by Davis. A person intends the logical and probable consequence of his actions, *see Watson, supra,* and we hold that a jury could infer by his conduct outside Kindig's door that Davis intended to continue to purposefully

create apprehension of imminent physical injury in Kindig once he gained entry into her apartment. We affirm Davis's conviction for attempted residential burglary.

CR 02-4246 Revocation

While the jury was deliberating in the guilt phase of CR 04-4879, the trial court heard the testimony of Davis's probation officer, Melinda Perkins, who stated that Davis had not reported to her since March 15, 2004, at which time they discussed the rules of his probation. Perkins also testified that Davis had not paid any supervision fees since that time. However, Perkins admitted that she did not know if Davis was signing in and reporting on records when a probation officer was not there, and she said that such sign-ins would not be a part of her records.

Davis also testified at the revocation hearing, stating that when his old probation officer left, he began seeing the supervisor. He said that the supervisor told him that it was okay not to pay on his fees while he was "low on funds," but that he could make up the payments at a later date. Davis also said that his sister, who worked at "community punishment" according to Davis, told him that his fees were paid.

The trial court reserved ruling on the probation-revocation petition until the jury had returned guilty verdicts on all three charges in CR 04-4879 and had fixed Davis's sentences in that case. The trial court then revoked Davis's probation and sentenced him to ten years in the Arkansas Department of Correction in CR 02-4246, with that sentence to run concurrently with the sentence in CR 04-4879.

a. Adverse Ruling

The only adverse ruling during the probation-revocation portion of the hearing was the trial court's decision to revoke Davis's probation. A trial court may revoke a defendant's probation at any time prior to the expiration of the period of probation if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his probation. Ark. Code Ann. § 5-4-309(d) (Supp. 2005). In probation revocation proceedings, the State has the burden of proving that appellant violated the terms of his probation, as alleged in the revocation petition, by a preponderance of the evidence, and this court will not reverse the trial court's decision to revoke probation unless it is clearly against the preponderance of the evidence. *Stinnett v. State*, 63 Ark. App. 72, 973 S.W.2d 826 (1998). The State need only show that the appellant committed one violation in order to sustain a revocation. *See Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000). In testing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Reese v. State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988).

Here, the State presented evidence that Davis had failed to report to his probation officer and had failed to pay his probation fees. Additionally, the jury in CR 04-4879 convicted him of three criminal offenses, which also violated the conditions of his probation. Any one of these violations is sufficient to support the revocation of Davis's probation.

b. Pro Se Points

Davis has also filed a *pro se* point with regard to the revocation of his probation. After a recitation of the facts of his case, Davis states, "The State failed to prove that

Appellant Davis violated any rules on the 'Conditions of Release' other than pending case CR 04-4879. Appellant Davis requests that this Court reverse and dismiss the revocation in case CR 02-4246." However, as discussed above, there was sufficient evidence to support the conviction for attempted residential burglary in CR 04-4879, and the commission of this offense is sufficient to support the revocation of Davis's probation. We hold that there are no issues that would merit reversal with regard to the probation revocation, and we affirm the revocation of Davis's probation and grant his counsel's motion to withdraw with respect to CR 02-4246.

The kidnapping conviction is modified to false imprisonment in the second degree;[1] the criminal attempt to commit residential burglary conviction is affirmed; the probation revocation is affirmed; and counsel's motion to withdraw in CR 02-4246 is granted.

NEAL and ROAF, JJ., agree.

[1] Because we are affirming Davis's felony conviction for attempted residential burglary, it is not necessary to re-sentence him for second-degree false imprisonment. That offense is a Class A misdemeanor, and its sentence is satisfied by service of the felony sentence. *See* Ark. Code Ann. § 5-4-403(c)(1) (Repl. 2006).